83-1059

No.

In The
Supreme Court of the United States
October Term, 1983

JOHN T. LANGEN,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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QUESTION PRESENTED

Should a new United States Supreme Court decision or a new principle of law enunciated by the United States Supreme Court be given retroactive application to the detriment of a defendant in a criminal case?

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TABLE OF CASES

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JOHN T. LANGEN,

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The Petitioner, John T. Langen, by his counsel Mel A. Sachs, respectfully prays that writ of certiorari issue to review the judgment and order of the Court of Appeals of the State of New York reversing the order of the Supreme Court of the State of New York, County of New York, granting petitioner's motion to suppress tangible evidence.

OPINION BELOW

The opinion of the Court of Appeals of the State of New York (Appendix, *Infra*) is not yet reported.

JURISDICTION

The order of the Court of Appeals of the State of New York was entered on October 27, 1983. This Court's jurisdiction is invoked under Title 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

United States Constitution—Amendment IV.

STATEMENT OF THE CASE

On September 14, 1980 two police officers in a patrol car allegedly observed the petitioner, John T. Langen, sniffing cocaine as he drove his pick-up truck across the Queensboro Bridge. The two officers stopped Mr. Langen's vehicle and, after he stepped out of his truck to provide them with his license and registration, they allegedly saw in Mr. Langen's pocket a plastic vial containing white powder. The police officers immediately arrested him.

Subsequent to the arrest of Mr. Langen, one of the officers observed a locked suitcase behind the seat in the pick-up truck. The officer then took the locked suitcase out of the truck and broke it open with a screwdriver. Inside the suitcase the officer allegedly found several envelopes containing a white powdery substance, later identified as cocaine, and other items.

At the time that the locked suitcase was forced open and searched, the petitioner, who was under arrest, was not in the truck nor had a search warrant been obtained.

The petitioner, was subsequently charged with criminal possession of a controlled substance in the third degree solely as a result of the cocaine allegedly found in the locked suitcase. Prior to trial, John Langen moved to suppress the evidence seized from the suitcase. On May 28, 1981, after a suppression hearing, the Court granted Langen's motion to suppress the evidence seized from the locked suitcase. The Court, citing *Arkansas v. Sanders*, 442 U.S. 753 and *United States v. Chadwick* 433 U.S. 1, found that the police officers failure to obtain a warrant before forcing open and searching the locked suitcase was directly in violation of Langen's Constitutional rights.

Since the suppression court granted Langen's motion the United States Supreme Court in *United States v. Ross*, 456 U.S. 798, had expanded the scope of the automobile exception and, in doing so, effectively overruled *Chadwick* and *Sanders*.

On appeal to the Supreme Court of the State of New York Appellate Division, First Department, the Court unanimously affirmed the suppression court's granting of Langen's motion. The Court of Appeals, citing *United States v. Ross, supra*, applied the decision retroactively, reversed the orders of the Appellate Division and the suppression court and thus, denied Langen's motion to suppress evidence.

REASONS FOR GRANTING THE WRIT

POINT

THE RETROACTIVE APPLICATION OF A NEW SUPREME COURT DECISION TO THE PETITIONER WAS CONTRARY TO THE DECISIONS OF THE UNITED STATES SUPREME COURT

The New York State Court of Appeals, as its sole basis for reversal of the lower court orders granting petitioner Langen's motion to suppress physical evidence seized from the locked suitcase cited the Supreme Court's decision in *United States v. Ross*, 456 U.S. 798. In reaching its decision to apply *Ross* retroactively to the Petitioner, the Court necessarily determined that *United States v. Johnson*, 457 U.S. 537, required this result. This determination by the Court was in fact, erroneous and in conflict with the United States Supreme Court's decision in *United States v. Johnson, supra.*

Johnson, held that where the Court has declared a rule of criminal procedure to be "a clear break with the past," (Desist v. United States, 394 U.S. at 248), it almost invariably has gone on to find such a principle nonretroactive. [See *United States v. Peltier*, 442 U.S. 531, 547, n.5 Brennan, J. dissenting]. The Court further stated that "[s]uch a break has been recognized only when a decision explicitly overrules a past precedent of this Court or disapproves a practice this Court arguably has sanctioned in prior cases . . . "

United States v. Ross, supra, squarely falls into this category of cases set forth in *Johnson*. The *Ross* Court stated that their decision was inconsistent with the disposition in *Robbins v. California*, 435 U.S. 420,

(reaffirming the rationale of *Arkansas v. Sanders*, 442 U.S. 753, as applied to wrapped packages found in the unlocked luggage compartment of a vehicle) and with the portion of the opinion in *Sanders*, on which *Robbins* relied.

Clearly, not arguably, *Ross* disapproved of practices that the Court had sanctioned in prior cases. In both *United States v. Chadwick* 433 U.S. 1, and *Arkansas v. Sanders, supra*, the Court held that the police must have a warrant before they may search luggage that they have legally seized from an automobile. Thus, such evidence obtained without a warrant must be suppressed under the exclusionary rule. *Ross*, explicitly disapproved of the practices sanctioned by the *Chadwick* and *Sanders* Courts.

The New York State Court of Appeals clearly erred in applying Ross retroactively to the petitioner. The Court further stated that the "Supreme Court's decision in *Ross* falls under none of [the] categories" set forth in *Johnson*. In fact this decision of the Court of Appeals is directly in conflict with the standards set forth in *United States v. Johnson*. Further, it has not been the practice of the Courts to apply a new Supreme Court decision or a new principle of law enunciated by the Supreme Court retroactively to the detriment of a defendant in a criminal case.

Clearly, the standards set forth in *United States v. Johnson, supra*, require that the *Ross* decision *not* be given retroactive application to the petitioner, John Langen. The time has arrived for the United States Supreme Court to settle this most important question of law.

CONCLUSION

FOR THESE REASONS A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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APPENDIX

OPINION OF COURT OF APPEALS

STATE OF NEW YORK
COURT OF APPELS

THE PEOPLE ETC.,

Appellant,

-against-

JOHN T. LANGEN,

Respondent.

Robert M. Morgenthau, DA, NY County (Joyce P. Adolfsen & Mark Dwyer of counsel) for appellant, Mel A. Sachs, NY City, for respondent.

COOKE, Ch. J.:

This appeal presents the question left undecided in *People v. Belton* (55 NY2d 49, 54, n3): whether, when police engage in a lawful search pursuant to the automobile exception to the State and Federal Constitutions' warrant requirements, they may search a locked container located in the passenger compartment of an automobile. It is held that when the circumstances giving rise to probable cause to arrest a driver or passenger in the automobile also support the belief that the automobile contains contraband related to the crime for which the arrest is

made, police may search, within a reasonable time after the arrest, any container, locked or otherwise, located in the automobile.

I

Police stopped defendant after they observed him driving his pickup truck while a female passenger held under his nose a rolled bill inserted into a small manila envelope. When defendant stepped out of his vehicle, police saw a plastic vial containing white powder protruding out of defendant's vest pocket. The vial was seized and defendant was arrested, frisked, and administered *Miranda* warnings. Defendant volunteered that a traveling bag located behind the seat in the passenger compartment of the truck did not belong to him. One of the officers removed the piece of luggage, which was locked, forced it open with a screw driver, and found cash, a bank account book in defendant's name, and several envelopes containing a white powdery substance, later identified as cocaine.

Defendant moved to suppress the material seized from the suitcase as taken in violation of his constitutional rights against unreasonable searches and seizures. The court found that while the initial stop of defendant was valid, the police were required to obtain a warrant before searching the locked bag and, therefore, the material seized from it should be suppressed. In so holding, the suppression court relied on the Supreme Court's decisions in *United Sttes v. Chadwick* (433 US 1) and *Arkansas v. Sanders* (442 US 753).

The analysis employed by the court in finding no justification for the warrantless search of defendant's

suitcase centered on the holdings in *Chadwick* and *Sanders* that, unlike the situation with respect to automobiles generally, a person has no reduced expectations of privacy with respect to property kept in closed containers and, once a container has been seized by police, the obtaining of a warrant for their search is no longer impracticable. The court reasoned that inasmuch as defendant had a legitimate expectation of privacy in the contents of his suitcase, and no exigency existed, police had no justification to proceed with the search in the absence of a warrant. The Appellate Division affirmed without opinion.

II

Since the suppression court granted defendant's motion, the United States Supreme Court in *United States v. Ross* (456 US 798), has expanded the scope of the automobile exception and, in doing so, explicated and distinguished *Chadwick* and *Sanders*. Inasmuch as one of the principal points of contention in this appeal concerns whether *Ross* should be given retrospective application, it is necessary to examine the Supreme Court's reasoning in *Chadwick* and *Sanders*, as well as its decision in *Ross*.

A

In *Chadwick*, the Supreme Court considered the argument whether the rationale underlying the automobile exception to the Fourth Amendment's warrant requirement should apply to movable, closed containers. In that case, Federal railroad agents became suspicious when they noticed that a padlocked footlocker that was to be loaded on a train was unusually heavy and was leaking talcum powder, a

substance known to be used to mask the aroma of marijuana. The train was met at its destination by Federal narcotics agents who, through the use of a trained police dog, determined that the footlocker contained marijuana. Rather than securing a warrant, the agents waited for the defendant to retrieve the footlocker, whereupon it was seized and searched. A large quantity of marijuana was discovered.

In evaluating the reasonableness of the warrantless search, the Court considered the rationale underlying the automobile exception to the Fourth Amendment's warrant requirement. The Court noted that the search of automobiles believed upon probable cause to contain contraband has constituted a longstanding exception to the warrant requirement (see *United States v. Chadwick*, 433 US 1, 11-12, *supra;* see, also, *Carroll v. United States*, 267 US 132). While the basis for this exception historically had been the inherent mobility of the automobile, which made obtaining a warrant impracticable, the Supreme Court also acknowledged that it had "sustained 'warrantless searches of vehicles * * * in cases in which the possibilities of the vehicle's being removed or evidence in it destroyed were remote, if not nonexistent' " (*United States v. Chadwick*, 433 US 1, 12, *supra* quoting *Cady v. Dombrowski*, 413 US 433, 441-442). The Court noted that great reliance in supporting the exception was placed on the diminished expectation of privacy one has in an automobile, due to its highly visible interior, its use on public thoroughfares, and its being subjected to extensive regulation and inspection (*id.* at pp. 12-13).

This diminished expectation of privacy surrounding automobiles, the Court held, did not apply to the

footlocker or other closed luggage. The footlocker was not exposed to public view or "subject to regular inspections and official scrutiny on a continuing basis" (*id.* at p. 13). Nor, in the Court's view, did the mobility of a movable closed container justify excepting its search from the warrant requirement as the footlocker, having been immobilized, was not subject to loss or destruction pending the obtaining of a warrant (*id.*). Thus, the rationale underlying the automobile exception was inapplicable to closed containers, and, as a general matter, a search of closed, movable containers in non-exigent circumstances could not be conducted without a warrant.

In *Arkansas v. Sanders* (442 US 753, *supra*), the Court considered whether closed containers in a car may be examined as part of an otherwise proper search of the car under the automobile exception. In that case, police had been informed that the defendant would arrive on a particular flight landing at the Municipal Airport in Little Rock, Arkansas, carrying a green suitcase containing marijuana. The defendant, who fit the description given by the informant, arrived on the flight. Police observed him place some hand luggage in a taxi, and return to the terminal's baggage area to retrieve a green suitcase. The defendant handed the bag to a companioin who had met him at the airport. Eventually, both returned to the taxi and the green suitcase was placed in its trunk. Police stopped the taxi as it pulled away from the terminal and had the driver remove the green suitcase. A warrantless search of the suitcase revealed its contents to the marijuana.

The Supreme Court held that the warrantless search of the suitcase violated the Fourth Amend-

ment. The Court first reiterated its holding in *Chadwick* that the rationale supporting warrantless searches of automobiles—mobility and diminished expectation of privacy—do not apply to closed containers (see *Arkansas v. Sanders*, 442 US 753, 762, *supra*). While acknowledging that "[a] closed suitcase in the trunk of an automobile may be as mobile as the vehicle in which it rides," the Court noted that "the exigency of mobility must be assessed at the point immediately before the search—after the police have seized the object to be searched and have it securely within their control" (*id.* at p. 763). The Court stated that inasmuch as police had already seized the suitcase, "the extent of its mobility [was] in no way affected by the place from which it was taken" (*id.*). The Court added that while the administrative burdens to law enforcement agencies attendant in requiring them to post guard or to move and store an immobilized automobile while procuring a search warrant provide an additional basis for permitting a warrantless search, "[n]o comparable burdens are likely to exist with respect to the seizure of personal luggage" (*id.* at pp. 765-766, n 14). Accordingly, the search was held not justified under the automobile exception.

In *United States v. Ross* (456 US 798, *supra*), the scope of the automobile exception was expanded. In that case, police received a tip from a reliable informant that a man was selling narcotics from the trunk of a "purplish maroon" Chevrolet Malibu with District of Columbia license plates. The car described by the informant was sighted by police while being driven in an area in which the informant stated it would be located. Police stopped the car and told defendant to step out. The officers then conducted a warrantless search of the car and found a brown paper

bag in its trunk. They opened the bag and discovered glassine envelopes containing what was later determined to be heroin.

The question before the Supreme Court was "the extent to which police officers—who have legitimately stopped an automobile and who have probable cause to believe that contraband is concealed somewhere within it—may conduct a probing search of compartments and containers within the vehicle whose contents are not in plain view" (*id.* at p. 800). The Court held that in such circumstances, police may conduct a search "that is as thorough as a magistrate could authorize in a warrant 'particularly describing the place to be searched' " (*id.*). The Court added that under this holding, "[t]he scope of a warrantless search of an automobile * * * is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which [upon *post hoc* determination] there [was] probable cause to believe that it may be found" (*id.* at p. 824).

The Court reasoned that: "A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search. Thus, a warrant that authorizes an officer to search a home for illegal weapons also provides authority to open closets, chests, drawers, and containers in which the weapon might be found. A warrant to open a footlocker to search for marijuana would also authorize the opening of packages found inside. A warrant to search a vehicle would support a search of every part of the vehicle that might contain the object

of the search. When a legitimate search is under way, and when its purpose and its limits have been precisely defined, nice distinctions between closets, drawers, and containers, in the case of a home, or between glove compartments, upholstered seats, trunks, and wrapped packages, in the case of a vehicle, must give way to the interest in the prompt and efficient completion of the task at hand" (*United States v. Ross*, 456 US 798, 820-821, *supra*).

In so holding, the Court reaffirmed its result in *Sanders*, but characterized it as not a "true" automobile exception case—a case in which police had probable cause to believe that contraband was secreted *somewhere* in the automobile necessitating a search of the entire automobile. Rather, the Court stated that *Sanders* should have been considered a case closely akin to *Chadwick*, in which a warrant was required because there was probable cause to search *only* a container. As probable cause to search was localized in the suitcase, mere placement of the suitcase in the taxi did not give rise to generalized probable cause to believe that contraband was located somewhere in the taxi, thereby invoking the automobile exception and justifying a warrantless search of the entire taxi, including the suitcase in tbhe trunk (*id.* at pp 812-813; see *Arkansas v. Sanders*, 442 US 753, 766-767 [Burger, Ch. J., concurring], *supra*).

B

Defendant, in urging affirmance of the suppression order, argues that his motion was properly decided according to the law then extant defining the scope of the automobile exceptions to the warrant requirements of the Fourth Amendment and section 12 of article I of the New York State Constitution (see *People v. Belton*, 55 NY2d 49, 54, n 3, *supra*), and that under the retrospectivity principles enunciated in *United States v. Johnson* (457 US 537), the Supreme Court's holding in *Ross* constituted a clear break with past precedent and therefore should be given prospective effect only. The People argue that the Supreme Court's decisions in *Ross* and this court's decision in *People v. Belton (supra)* "instruct that the search of defendant's suitcase and the recovery of his cocaine were lawful" (App Br, p. 15). It is further argued that constitutional pronouncements that uphold or validate police conduct should be applied to cases not yet final at the time the pronouncement is made.

Consideration first turns to whether, under *United States v. Johnson (supra)*, the rule announced in *Ross* should be applied to this appeal. In *Johnson*, the court examined the circumstances in which a "new" Fourth Amendment interpretation will be applied to cases that are on direct appeal when the rule is announced. Three "threshold" categories of cases were identified as necessarily requiring either retrospective or prospective application of the newly announced constitutional rule. When the rule constitutes the application of settled principle to a novel factual situation "it has been a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that

rule in any material way" (*United States v. Johnson*, 457 US 537, 549, *supra*). When, however, the court has *expressly* characterized the ruling to be " 'a clear break with the past,' " it will be applied only prospectively (*id.*). Finally, when the constitutional ruling serves to void *ab initio* a trial court's authority to convict or punish a criminal defendant, that construction will be accorded full retroactive effect (*id.* at pp. 550-551).

The Supreme Court's decision in *Ross* falls under none of these categories. On the one hand, the rule announced in *Ross* cannot be characterized as an application of settled precedent to a new factual setting. Indeed, in *Robbins v. California* (453 US 420), the Court's last statement before *Ross* on the permissible scope of warrantless searches of automobiles, a majority of the court, relying on the rationale in *Sanders*, construed the Fourth Amendment to forbid the warrantless search of closed containers found in an automobile, notwithstanding that police had engaged in a lawful search of the automobile itself (*id.* at pp 428, 429-430). On the other hand, the Court's decision in *Ross* may not be considered "a clear break" with past precedent under the *Johnson* standard, which places great weight on how the court characterizes its holding in relation to past precedent (see *United States v. Johnson*, 457 US 537, 549, 551-552, *supra*). The Court, in *Ross*, while acknowledging that its decision substantially overruled the holding in *Robbins* and the rationale in *Sanders*, also noted that "no legitimate reliance interest can be frustrated" by its decision in *Ross*, and that it is "convinced" that the rule enunciated in *Ross* "is faithful to the interpretation of the Fourth Amendment that the Court has followed with substantial consistency throughout [its]

history" (*United States v Ross*, 456 US 798, 824, *supra*). The *Ross* decision clearly does not fall under the third "threshold" category as it does not serve to completely insulate a defendant from conviction or punishment.

When the retrospective effect of a constitutional pronouncement is not controlled by a threshold rule, the Supreme Court has instructed that the newly announced rule should apply to all cases on direct review (see *United States v. Johnson*, 457 US 537, 554, *supra*; see, also, *Linkletter v. Walker*, 381 US 618; *Tehan v. United States ex rel. Shott*, 382 US 406) as this would advance the principles that a court should not ordinarily diverge from the policy of *stare decisis*, that justice should be afforded the litigants on the merits of the case, and that cases should be resolved according to the best understanding of the constitutional principles involved (see *United States v. Johnson*, at pp 554-555, *supra*). The court also noted that "[a]n approach that resolved all non-final convictions under the same rule of law would lessen the possibility that this Court might mete out different constitutional protection to defendants simultaneously subjected to identical police conduct" (*id.* at p. 556).

Applying this rule indicates that *United States v. Ross* should be given retrospective application to all cases on direct review, including the instant appeal. Inasmuch as the principles of retrospectivity discussed above are derived from general principles of judicial decisionmaking, this court perceives no reason for its application to differ when the new constitutional pronouncement narrows rather than broadens a prior understanding of a constitutional protection.

C

Under the rule announced in *Ross*, it is evident that the officer's warrantless search of defendant's suitcase here was permissible under the automobile exception to the Fourth Amendment's warrant requirement. The police observation of defendant's companion holding under defendant's nose a paper cylinder protruding from a manila envelope provided ample cause for police to believe that defendant was ingesting a controlled substance. Indeed, as the suppression court noted, "[g]iven the state of affairs in New York City in 1981, the average moderately aware, reasonable and prudent citizen who saw defendant's behavior would have drawn the same conclusion as the police officers." Thus, the initial stop was reasonable.

Immediately after the stop, as defendant was retrieving his license and registration from his pocket, a vial containing white powder came into plain view. There is an affirmed finding that probable cause to arrest defendant arose at this point from "the combination of the officers' observations also gave the officers cause to believe that contraband was secreted somewhere within defendant's truck. Having observed the manila envelope, which was of the type typically used to contain controlled substances, and later having observed the vial containing white powder, police reasonably could have undertaken a search of the automobile. Thus, inasmuch as there was probable cause to believe contraband was located somewhere in the truck, police were free, under the Fourth Amendment, to conduct a warrantless search of the entire truck, including any compartments, and the locked suitcase (see *United States v. Ross*, 456 US 798,

supra). This was not an instance in which probable cause to search focused only on the particular piece of luggage.

D

This court's inquiry into this search's reasonableness does not end, however, upon the determination that it passed muster under the Fourth Amendment. This court has held that "[b]y interposing the requirement of a warrant issued judicially, upon information attested by oath or affirmation and which establishes probable cause, the State Constitution protects the privacy interests of the people of our State, not only in their persons, but in their houses, papers and effects as well, against the unfettered discretion of government officials to search or seize" (*People v. Belton*, 55 NY2d 49, 52, *supra*; see NY Const, art I, §12).

In *People v. Belton* (55 NY2d 49, 54, *supra*), this court recognized a "narrow" automobile exception to the State Constitution's warrant requirement. "[T]he reduced expectation of privacy associated with automobiles and the inherent mobility of such vehicles" combine to justify the warrantless search of an automobile upon probable cause to believe it carries contraband (*id.* at p. 53). The court cautioned, however, that under the State Constitution, "[t]he automobile exception [is] * * * subject to the limitations inherent in the factors that are its predicate" (*id.* at p. 54).

In limited situations, such as in the instant appeal, the warrantless search of closed containers found in an automobile may be justified. The cir-

cumstances giving rise to a valid arrest of the driver or passenger of an automobile may also permit police to search a closed container found in the automobile. In *Belton*, this court held that when "police have validly arrested an occupant of an automobile, *and* they have reason to believe that the car may contain evidence related to the crime for which the occupant was arrested or that a weapon may be discovered or a means of escape thwarted, they may contemporaneously search the passenger compartment, including any containers found therein" (*People v. Belton*, 55 NY2d 49, 55, *supra*, [emphasis supplied]).

It is noted that there is no inconsistency in this rule and the general rule governing the permissible scope of a search incident to arrest (see *People v Smith*, 59 NY2d 454, *supra*). The rule provided above has reference to property stored in an automobile and the lack of a need for obtaining a warrant, which do not attach in other circumstances. Moreover, while a search incident to arrest may be conducted without probable cause beyond that to arrest the person, thereby necessitating the strict temporal and spatial limits, as well as the presence of some exigency, the above rule requires both probable cause to search the automobile generally and a nexus between the probable cause to search and the crime for which the arrest is being made.

The officer's warrantless search of defendant's suitcase was permissible under the State Constitution. Upon defendant's arrest for drug possession, the police had probable cause to believe that contraband related to that crime was located somewhere in the truck. Therefore, they could properly search the entire truck, including any closed containers found therein.

It was irrelevant that the suitcase was locked. Again, under our State Constitution as under the Federal Constitution it is critical that the probable cause here related to the automobile and did not focus exclusively on the container.

Accordingly, the order of the Appellate Division should be reversed and defendant's motion to suppress denied.

DECISION DATED OCTOBER 27, 1983

PEOPLE V. LANGEN
Case No. 436

WACHTLER, J. (concurring)

The majority has done an excellent job of attempting to determine what the Supreme Court has held in the past and may hold in the future with respect to automobile searches following an arrest. However, on the facts of this case, I do not believe that is necessary. In my view when the defendant called the officers' attention to the locked piece of luggage and stated that it was not his, he made it clear that he had no expectation of privacy with respect to the luggage or its contents (see, *Rawlings v. Kentucky*, 448 US 98, 104-106). Because there is no showing that the defendant's rights were implicated it is unnecessary for this Court to determine whether the search would have been lawful under standards not yet pronounced by the United States Supreme Court.

* * *

Order reversed and defendant's motion to suppress denied. Opinion by Chief Judge Cooke in which Judges Jasen, Jones, Simons and Kaye concur. Judge Wachtler concurs in result in a memorandum in which Judge Meyer concurs.

Decided October 27, 1983

ORDER OF THE APPELLATE DIVISION DATED NOVEMBER 4, 1982

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on November 4, 1982

Present:
Hon. Francis T. Murphy, Jr.
Presiding Justice
Hon. Theodore R. Kupferman
Hon. Arthur Markewich
Hon. J. Robert Lynch, Justices

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

-against-

JOHN T. LANGEN,

Defendant-Respondent.

An appeal having been taken to this Court by the above-named appellant, from an order of the Supreme Court, New York County (M. Williams, J.), entered on May 28, 1981, which granted defendant's motion to suppress the tangible evidence seized in luggage taken from defendant's vehicle,

And said appeal having been argued by Joyce P. Adolfsen of counsel for appellant, and by Mel A.

Sachs of counsel for respondent; and due deliberation having been had thereon,

It is unanimously ordered that the order so appealed from be and the same hereby is affirmed.

ENTER:
ALAN M. BERGER
DEPUTY CLERK

DECISION AND ORDER

SUPREME COURT: NEW YORK COUNTY
CRIMINAL TERM: PART 41

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

JOHN T. LANGEN,

Defendant.

MILTON L. WILLIAMS, J.:

An indictment was filed against defendant accusing him of the class B felony of criminal possession of a controlled substance in the third degree. The charge is that on September 14, 1980 defendant was found in possession of more than one-half ounce of cocaine.

Defendant, claiming to be aggrieved by an unlawful acquisition of evidence and having reasonable cause to believe that said evidence may be offered against him in the pending criminal action, has made a motion for an order suppressing such evidence upon the ground that it consists of tangible property obtained by means of an unlawful search and seizure under circumstances precluding admissiblity thereof in the pending criminal action against him.

The burden of persuasion here lay with the accused, on this motion to suppress evidence. The People have only the burden of going forward to show the

legality of the police conduct in the first instance; that is, they must show that the search was made pursuant to a valid warrant, consent or to one of the recognized exceptions to the warrant requirement.

A hearing on this matter was held before me on April 30, 1981. The witnesses called upon to testify were two police officers, Arthur Sekunda and Thomas Lewis, both presented on the People's case. The defense did not call any witnesses. I found each witness' testimony to be believable, candid and worthy of trust as a matter of both logic and vis-a-vis common, everyday experience and knowledge.

On September 14, 1980 at approximately 5:15 P.M. both defendant, John Langen, and Police Officers Arthur Sekunda and Thomas Lewis, were, in their respective vehicles, on the upper level of the Queensboro Bridge in the eastbound lanes. Defendant Langen was driving a 1974 blue Ford pickup truck in the left lane and the officers were in a marked patrol car in the right lane.

As the officers approached the truck from the rear, each observed a female passenger in the truck holding under the nose of defendant one hand, palm up containing a small manila envelope with the other hand holding what Officer Sekunda thought was a rolled bill. When they observed this, Officer Sekunda, who was driving the car, pulled into the left lane behind the pickup truck, turned on the revolving lights of the squad car, and signaled defendant to pull over to the right. The pickup pulled over, the officers exited the squad car and Officer Sekunda approached the driver's side of the pickup, requesting defendant's driver's license and registration. The defendant step-

ped out of the vehicle to talk to Officer Sekunda and to look through his wallet for the documents requested. While he was doing this, he was standing near the officer and facing him such that Officer Sekunda could see into the pocket of defendant's vest. Inside was a plastic vial containing a white powdery substance. Officer Sekunda took the vial out of the defendant's vest pocket (the right hand vest pocket), immediately arrested him, frisked him and gave him the *Miranda* warnings.

After the *Miranda* warnings were given, defendant turned to Sekunda, told him that a bag at the rear of the pickup did not belong to defendant and pointed the bag out to Officer Sekunda. The "bag" was a piece of luggage which was locked. Defendant's female companion was ordered out of the truck and was told to spreadeagle against the truck on the opposite side from defendant Langen. Officer Lewis, who was looking inside the truck, heard defendant mention the bag, pulled it out, forced it open with a screwdriver and examined its contents. He found a large plastic envelope containing smaller plastic envelopes which contained a white substance, cash, a bank book in defendant's name and a few small manila envelopes containing a white substance.

At the time when the luggage was forced open and searched neither defendant nor his passenger was in the truck nor had, needless to say, a warrant been obtained.

The controlling issue posited by this case for decision is whether or not under the circumstances, the seizure and search of the luggage was consistent with defendant's Fourth Amendment rights. It is my opinion that defendant's rights were violated.

The general rule for stopping a motor vehicle on a public highway by police officers is that it is justified only when conducted pursuant to nonarbitrary, nondiscriminatory, uniform highway traffic procedures or when there is specific cause or, at least, reasonable suspicion that a motorist is about to violate a law, has violated the law, or is violating the law, which cause must be based upon specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion, People v. Sobotker, 43 NY2d 559 (1978); People v. Ingle, 36 NY2d 413 (1975).

The stop involved in the instant case was reasonably warranted under the circumstances. The officers each testified that by formal and informal experience related to their jobs, they had been familiarized with narcotic drugs, drug paraphernalia and its usage. Seeing the conduct of defendant and his passenger, the small manila envelope in the upturned palm held under his nose, the rolled bill, etc. unquestionably provided the necessary predicate of specific and articulable facts, which along with rational inferences drawn from those facts, reasonably warranted the intrusion. Given the state of affairs in New York City in 1981, the average moderately aware, reasonable and prudent citizen who saw defendant's behavior would have drawn the same conclusion as the police officers, in my opinion.

If the initial stop was valid, as I found it to be, then the officers' request for license and registration was reasonable as well, since this power is granted them by statute, Vehicle and Traffic Law §§401(4) and (2); People v. Ingle at pp. 416-17. Moreover the evidence further states that defendant, after being

asked for those documents, stepped out of the truck of his own volition to facilitate pulling them out of his pockets. When he did this, the vial filled with white powder in his vest pocket came into plain view. The officer saw it, grabbed it and informed defendant that he was under arrest, probable cause being achieved by the combination of the officers' observations from their car plus the observation of the vial, People v. Wharton, 60 AD 291 (1977), aff. 46 NY2d 924, cert. den. 444 US 880 (1979). The observation of the vial was not tainted because the officer was in a position to observe the vial in plain view, as a result of valid police conduct. Harris v. United States, 390 US 234, 236 (1968).

Having arrested defendant for possession of a controlled substance, the officers could hardly ignore his reference to the suitcase; however, they erred fatally by opening it and seizing its contents on the spot. First of all, having effectively neutralized defendant and his passenger outside of the truck, there was no basis for searching the truck and seizing anything. Both defendants and the truck were under police control and there could no longer be a valid search incident to arrest as all exigency had been removed from the situation, People v. Belton, 50 NY2d 447 (1980), US (app. pndg.). Neither defendant had any prospect of gaining access to anything within the truck.

Secondly, to seize the suitcase and force it open merely compounded the error. The case law is clear and unequivocal on this point: luggage, especially locked luggage, is inevitably associated with the expectation of privacy. Absent exigent circumstances, police are required to obtain a warrant before searching luggage taken from a motor vehicle properly

stopped and searched, Arkansas v. Sanders, 442 US 753 (1979); United States v. Chadwick, 433 US 1 (1977). The fact that the luggage was taken from a motor vehicle does not bring the situation within the purview of the "automobile exception" since in fact there is no reason to distinguish luggage taken from motor vehicles from luggage taken from other places; its mobility is unaffected by what it is removed from. Arkansas v. Sanders, *supra*.

Defendant's motion to suppress tangible property seized from him under the circumstances recited *supra* is granted.

Dated: May 28, 1981

No. 83-1059

IN THE

Supreme Court of the United States

October Term, 1983

JOHN T. LANGEN,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Counter-Statement of Question Presented

Should evidence found in a search by the police that is plainly correct under *United States* v. *Ross*, 456 U.S. 798 (1982), be suppressed because the search took place before *United States* v. *Ross* was decided?

The New York Court of Appeals answered this question in the negative.

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Preliminary Statement

Petitioner seeks a Writ of Certiorari to review an October 27, 1983 order of the New York State Court of Appeals. By that order, the Court of Appeals reversed a November 4, 1982 order of the Appellate Division, First Department, and denied petitioner's motion to suppress physical evidence. The Court of Appeals remitted the case to the New York Supreme Court for further proceedings on the indictment.

Statement of the Case

This case originated in the late afternoon of September 14, 1980, when two police officers in a patrol car observed petitioner sniffing cocaine as he drove his pick-up truck on the upper level of the Queensboro Bridge. The officers stopped petitioner and, after petitioner stepped out of his truck to talk to the officers, saw in petitioner's vest pocket a plastic vial containing cocaine. Petitioner was arrested and was read the *Miranda* warnings. Moments later, without being asked a single question, petitioner suddenly volunteered to the officers that he had never before seen the locked suitcase located behind his seat in the pick-up truck. Upon hearing this, one of the officers removed the suitcase from the truck, opened it with a screwdriver and found cocaine, cash and Langen's bank book inside.

In Indictment No. SN4802/80, petitioner was charged with one count of Criminal Possession of a Controlled Substance in the Third Degree based upon his possession of the drugs found inside the suitcase (Penal Law §220.16). Petitioner moved to suppress those drugs. At the suppression hearing, the prosecutor argued, *inter alia*, that the search of Langen's suitcase was permissible. On May 28, 1981, after the hearing, Justice Milton Williams granted the motion to suppress. The court found that the initial stop was valid and that the arrest for the drugs in the vial which came into plain view was legal. However, the court, citing *People* v. *Belton*, 50 N.Y.2d 447 (1980), *Arkansas* v. *Sanders*, 442 U.S. 753 (1979), and *United States* v. *Chadwick*, 433 U.S. 1 (1977), found that the locked suitcase should not have been searched without a warrant.

On appeal to the Appellate Division, First Department, the People cited *People* v. *Belton*, 55 N.Y.2d 49 (1982), and *United States* v. *Ross*, 456 U.S. 798 (1982) and again argued that the search of Langen's locked suitcase was permissible. In response, petitioner argued that those cases, decided after the motion to suppress was granted in this case, should not be applied "retroactively" to the pending appeal. On November 4, 1982, the Appellate Division affirmed, without opinion, the order suppressing the cocaine.

Permission to appeal to the New York State Court of Appeals was granted on December 13, 1982. On appeal to that court the People once again cited *People* v. *Belton*, 55 N.Y.2d 49 (1982) and *United States* v. *Ross*, 456 U.S. 798 (1982) and again argued that the search of the locked suitcase was permissible. Petitioner again argued that these cases should not be applied "retroactively" to the pending appeal.

On October 27, 1983, the Court of Appeals reversed the order of the Appellate Division and denied petitioner's motion to suppress the physical evidence found in the suitcase. The majority of that court followed the analysis in *United States* v. *Johnson*, 457 U.S. 537 (1982), and found that *United States* v. *Ross*, 456 U.S. 798, should be given retroactive application to the instant appeal. The concurring judges found the analysis unnecessary. Inasmuch as petitioner had disavowed ownership of the suitcase and its contents, the concurring judges found that petitioner had no expectation of privacy in the suitcase. Thus, they concluded, the opening of the suitcase did not involve petitioner's Fourth Amendment rights.

Reasons for Denying the Writ

1. The State court decision in the instant case is not final.

Petitioner seeks to invoke this Court's jurisdiction under title 28 U.S.C. §1257(3). That section requires that the judgment appealed from be final. The final judgment in a criminal proceeding is the sentence. *Berman* v. *United States*, 302 U.S. 211 (1937); *Parr* v. *United States*, 351 U.S. 513, 518 (1956). Thus, a state court judgment which merely disposes of a motion relating to the admissibility of evidence lacks the finality necessary to support review by this Court. *See Chapman* v. *California*, 405 U.S. 1020 (1972).

Here, petitioner seeks to appeal from an order of the New York State Court of Appeals which denied petitioner's pre-trial motion to suppress physical evidence and remitted the matter to the New York Supreme Court for further proceedings, i.e., a trial on the indictment. Since petitioner has not yet been tried, much less sentenced, the order from which he seeks to appeal is clearly non-final. Thus, the Writ should be denied.

2. The instant case presents no constitutional question deserving of this Court's review.

In *United States* v. *Ross*, 456 U.S. 798 (1982), this Court held that if probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search. 456 U.S. at 825. Petitioner argues that the New York Court of Appeals erred in upholding the search in this

case, conducted prior to the date that *United States* v. *Ross* was decided. To support his argument, petitioner cites *United States* v. *Johnson*, 457 U.S. 537 (1982). In *Johnson*, this Court held that Fourth Amendment decisions enunciating a rule of law which invalidates police conduct should be given retroactive application to cases not yet final when that decision was rendered, *except* in cases where the police relied upon the prior, settled law. Petitioner argues that he fits within the exception carved out in *Johnson*. Therefore, he contends that *Ross* should not have been applied retroactively in this case by the New York Court of Appeals. Petitioner's contention is not worthy of review.

First, despite the fact that the Court of Appeals thought otherwise, *United States* v. *Johnson* is not relevant to the determination of the retroactivity of *Ross*. As just noted, in *Johnson*, this Court decided that a rule of law which invalidates police conduct should be applied retroactively except in cases where the police had relied upon prior, settled law. The Court in *Johnson* did not consider whether retroactive application should be given to a rule of law which upholds and validates police conduct. Thus, despite the fact that the holding in *Johnson* is broadly written, seemingly to encompass all Fourth Amendment decisions, *Johnson* has no relevance to a decision such as *Ross* which validates police conduct.

Even assuming *United States* v. *Johnson* were relevant to the determination of the retroactivity of *Ross*, petitioner would not fit within the exception to retroactivity noted in *Johnson*. An analysis of petitioner's argument makes plain that the exception in *Johnson* was intended to benefit the police and not the criminal. Petitioner contends that he fits

within the *Johnson* exception because he relied upon prior settled law. But, the exception to retroactivity in *Johnson,* which has the effect of maintaining the "status quo," is designed to uphold the conduct of police officers who relied upon prior settled law in the course of their official business. The exception reflects judicial recognition that there is no deterrence benefit in invalidating the actions of the police who were relying upon law which, at the time, was clear.

Here petitioner is attempting to fit within the exception by likening himself to a police officer. However, as this Court in *Ross* quite pointedly asserted, "any interest in maintaining the status quo that might be asserted by persons who may have structured their business of distributing narcotics or other illicit substances on the basis of judicial precedents clearly would not be legitimate." (*United States* v. *Ross,* 456 U.S. at 824 n.33).

Moreover, even if petitioner had the right to rely on settled law to conduct his narcotics business, the state court decision here would not be inconsistent with *Johnson* because the law petitioner cites was not settled. *See Robbins* v. *California,* 453 U.S. 420 (1981). Thus, even if *United States* v. *Johnson* were to be applied here, the *Ross* decision would be entitled to retroactive application since petitioner would not fall within the sole exception to retroactivity it describes.

The conclusion that *Ross* should be given retroactive effect has been reached by every Circuit Court which has considered the question. In *United States* v. *Burns,* 684 F.2d 1066 (2d Cir. 1982), *cert. denied,* 103 S. Ct. 823 (1983),

the Second Circuit applied *Ross* retroactively for the reasons described above. That court concluded that

> refusal to uphold searches later found constitutional would not serve the purposes underlying the exclusionary rule. . . . Because the Supreme Court has declared searches such as those involved here to be constitutional, no police misconduct has in fact occurred. Hence, there is no misbehavior to be deterred, and the interest in maintaining judicial integrity is not implicated, especially in light of the previously unsettled state of the case law in this area. *United States* v. *Burns*, 684 F.2d at 1074.

Courts of Appeals of other circuits have applied the Second Circuit's reasoning to give retroactive application to *United States* v. *Ross*. *See, e.g., United States* v. *Johns*, 707 F.2d 1093, 1097 (9th Cir. 1983); *United States* v. *Martin*, 690 F.2d 416, 421 (4th Cir. 1982). Clearly, the New York State Court of Appeals decision to apply *United States* v. *Ross* to uphold the search in the instant case was correct and in accord with federal law. There is no constitutional or federal question of substance to be decided here.

Conclusion

The petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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